

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 18, 2005

CHAD J. POWELL v. STATE OF TENNESSEE

Appeal from the Criminal Court for Sullivan County
No. C42,757 R. Jerry Beck, Judge

No. E2004-02694-CCA-R3-CO - Filed August 26, 2005

On June 23, 2000, a judgment by default was entered against the Appellant, Chad J. Powell, by the Sullivan County Criminal Court declaring him to be a Motor Vehicle Habitual Offender (MVHO). *See* Tenn. Code Ann. § 55-10-613(a) (2003). In September 2004, Powell filed a motion to set aside the MVHO judgment pursuant to Tenn. R. Civ. P. 60. As grounds for his motion, Powell alleged various procedural errors including noncompliance with Tenn. R. Civ. P. 58. Powell's motion to vacate the default judgment was denied by the trial court. After review, we conclude that Powell's issues are without merit. Moreover, we conclude that Powell's motion, which was filed in September of 2004, was not within a "reasonable time," as required by Tenn. R. Civ. P. 60.02. Accordingly, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Chad J. Powell, *Pro Se*, Mountain City, Tennessee.

Paul G. Summers, Attorney General and Reporter; Rachel E. Willis, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and B. Todd Martin, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Procedural History

On April 16, 1999, the Sullivan County District Attorney General filed a petition requesting that the Appellant be declared a motor vehicle habitual offender. The petition alleged that the Appellant had one conviction for driving while intoxicated in July 1995 and two convictions for driving on a revoked license in August 1995 and April 1998. The petition and a "show cause" order filed on June 16, 1999, directed the Appellant to appear on July 15, 1999, to show cause as to why

he should not be found a habitual offender. The petition and order was returned to the court unserved after the period for service had expired, and, on December 15, 1999, the trial court issued a second “show cause” order with a hearing set for February 17, 2000. A copy of the petition and order was personally served on the Appellant on February 4, 2000. The State subsequently filed a notice of hearing, mailed to the Appellant on May 22, 2000, which specified a hearing date of June 23, 2000. The Appellant failed to appear at the scheduled June 23, 2000 hearing, and a default judgment signed by the court found the Appellant to be a motor vehicle habitual offender. A copy of the default judgment was personally delivered to the Appellant on August 6, 2000.

On September 8, 2004, the Appellant filed a motion to set aside the default judgment pursuant to Tenn. R. Civ. P. 60.02. The trial court denied the Appellant’s motion on October 28, 2004, finding that “the *pro se* motion [was] totally without merit.” The Appellant filed a notice of appeal on November 4, 2004.

Analysis

I. Appearance After Thirty Days

The Appellant argues that the default judgment entered in this case is void because the State did not comply with Tennessee Code Annotated section 55-10-608(b) (2003) which states “the order of the court shall specify a time certain, not earlier than thirty (30) days after the date of service of the petition and order, at which the defendant shall first appear before the court.” The State concedes error as the hearing date of February 17 was within the thirty-day period following service, which was obtained on February 4. Nonetheless, the Appellant was personally served by a deputy sheriff with a copy of the petition and show cause order on February 4, 2000, and no action was taken by the State on the scheduled date of February 17. Rather, a “Notice of Hearing” was mailed to the Appellant on May 22 ordering the Appellant to appear on June 23, 2000. The notice of hearing contained a certificate of service by the assistant district attorney certifying that the notice was mailed to the Appellant’s last known address. *See* Tenn. R. Civ. P. 5.02 (permitting service of notice by mail subsequent to service of original process). Accordingly, the show cause hearing was scheduled well beyond the thirty-day required period which would have permitted the Appellant to answer the petition if he had chosen to do so.

II. Conformity with Rule 58

The Appellant also contends that the default judgment entered in this case is void because it does not comply with Tenn. R. Civ. P. 58, which provides in relevant part as follows:

Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry:
(1) the signatures of the judge and all parties or counsel, or
(2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or

(3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

The Appellant argues that because he did not sign the default judgment and that because the officer serving the papers signed the return of service, the judgment is void. Our review of the record reveals that the default judgment complies with the second provision of Rule 58 because it contains the signature of the judge, the signature of the Assistant District Attorney, and a certificate of service by the assistant district attorney certifying that a copy of the default judgment was mailed on June 23, 2000, to the Appellant as provided by Tenn. R. Civ. P. 5. Additionally, the record reflects from the return of service that a deputy sheriff personally served a copy of the default judgment on the Appellant on August 6, 2000. Accordingly, we conclude that the judgment by default was proper and became a final judgment upon its entry on June 23, 2000.

III. Convictions Under Motor Vehicle Habitual Offender Act

Finally, the Appellant claims that the MVHO order is void because the petition alleged inappropriate convictions pursuant to Tennessee Code Annotated section 55-10-603 as amended in 2000. The State based its petition on the Appellant's July 18, 1995 conviction for driving while intoxicated, as well as the resulting August 22, 1995 and April 23, 1998 convictions for driving on a revoked license. The Appellant contends that because in 2000, the legislature deleted the language from subsections (ix) and (x) from Tennessee Code Annotated section 55-10-603(2)(A), which included driving with a revoked license as a qualifying offense for an individual to be declared an habitual offender, two of his three offenses no longer qualify under the MVHO Act. We recognize that while our legislature did remove certain terminology from these subsections, it replaced it with new subsection (xv) which states:

A violation of § 55-50-504, related to driving on a cancelled, suspended or revoked license if the underlying offense resulting in such cancellation, suspension or revocation is an offense enumerated in the subdivision (2)(A)(i)-(2)(A)(xiv).

Tenn. Code Ann. § 55-10-603(2)(A)(xv) (2003). The language of subsection (xv) indicates that if an individual's license is revoked due to a violation of § 55-10-401, prohibiting driving while intoxicated, and that person is subsequently convicted for driving with a revoked license, this conviction qualifies him/ her for MVHO status. Therefore, this issue is without merit.

IV. Timeliness of Appellant's Motion to Void Judgment

Notwithstanding our holding that the Appellant's issues lack merit, the State's argument on appeal centers on the Appellant's long delay in seeking relief. *See State v. Collis Branch*, No. E2001-00711-CCA-R3-CD (Tenn. Crim. App. at Knoxville, Dec. 10, 2001). Proceedings under the MVHO Act are civil rather than criminal in nature. *State v. Malady*, 952 S.W.2d 440, 443 (Tenn. Crim. App. 1996) (citing *Everhart v. State*, 563 S.W.2d 795 (Tenn. Crim. App. 1978)). Relief under Rule 60.02 is considered "an exceptional remedy." *Nails v. Aetna Ins. Co.*, 834 S.W.2d 289, 294

(Tenn. 1992). Thus, “the party seeking relief from a judgment bears a heavy burden.” *Joe Trammell v. George W. Pope, Jr.*, No. M1999-00886-COA-R3-CV (Tenn. Ct. App. Aug. 9, 2000), *perm. to appeal denied*, (Tenn. Mar. 5, 2001). The scope of review on appeal for relief from a judgment pursuant to Rule 60.02 is limited to whether the trial judge abused his discretion. *Banks v. Dement Const. Co., Inc.*, 817 S.W.2d 16, 18 (Tenn. 1991). A discretionary judgment of the trial court will not be reversed for abuse of discretion unless it “‘affirmatively appears that the trial court’s decision was against logic or reasoning, and caused an injustice or injury to the party complaining.’” *Marcus v. Marcus*, 993 S.W.2d 596, 601 (Tenn. 1999) (quoting *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996)).

Furthermore, when seeking to set aside a judgment under Rule 60.02, the moving party has the burden to prove “that he is entitled to relief, and there must be proof of the basis on which relief is sought.” *Banks*, 817 S.W.2d at 18. The moving party must establish by clear and convincing evidence that relief from the judgment is warranted. *Duncan v. Duncan*, 789 S.W.2d 557, 563 (Tenn. Ct. App. 1990), *perm. to appeal denied*, (Tenn. May 14, 1990). Indeed, Rule 60.02 was designed to strike a proper balance between the competing principles of finality and justice. *Banks*, 817 S.W.2d at 18 (quoting *Jerkins v. McKinney*, 533 S.W.2d 275, 280 (Tenn. 1976)). In *Banks*, our supreme court examined the purpose of Rule 60.02 and found:

Rule 60.02 acts as an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules. Because of the importance of this “principle of finality,” the “escape valve” should not be easily opened.

817 S.W.2d at 18 (quoting *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991) (internal citation omitted)).

Tenn. R. Civ. P. 60.02 provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or the party’s legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake . . . ; (2) fraud . . . ; (3) the judgment is void; (4) the judgment is satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated . . . ; or (5) any other reason justifying relief from the operation of the judgment. *The motion shall be made within a reasonable time*, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken. . . .

(emphasis added).

In this case the Appellant did not seek relief from the default judgment entered against him until four years after its entry. The record reveals that the Appellant had notice of the June 23, 2000 proceedings to show cause as to why he should not be declared a motor vehicle habitual offender,

and he chose not to appear. He received service on the default judgment on August 6, 2000, but did not file his motion to void the judgment until September 8, 2004. Though notably absent from the appellate record, in his brief the Appellant admits that his subsequent indictment and conviction for violation of the MVHO Act and resulting eighteen month sentence have prompted his actions to vacate the judgment declaring him a motor vehicle habitual offender. Although the Appellant in this case is proceeding *pro se*, he offers no explanation for his four-year delay in bringing his motion to set aside the judgment under Rule 60.02. *See Branch*, No. E2001-00711-CCA-R3-CD (motion to vacate MVHO judgment not timely where defendant waited almost six years after date of entry and no reason was provided for delay) (citing *State v. Michael Samuel Edison*, No. 03C01-9711-CR-00506 (Tenn. Crim. App. at Knoxville, Mar. 24, 1999)). Accordingly, as argued by the State, we find no error in the trial court's decision denying relief from the judgment pursuant to Tenn. R. Civ. P. 60.02.

CONCLUSION

Based upon the foregoing reasons, we conclude that the Appellant's issues are without merit. Moreover, we conclude that the Appellant's four-year delay in seeking to set aside the default judgment was not filed within a "reasonable time" as required by Tenn. R. Civ. P. 60.02. As such, the judgment of the Sullivan County Criminal Court is affirmed. Costs are assessed against the Appellant, Chad J. Powell, for which execution may issue, if necessary.

DAVID G. HAYES, JUDGE